(12)

Supreme Court, U.S.
FILED
FEB 21 2006
OFFICE OF THE CLERK

No. 05-18

IN THE

Supreme Court of the United States

ARLINGTON CENTRAL SCHOOL DISTRICT
BOARD OF EDUCATION,

Petitioner,

v.

PEARL MURPHY and THEODORE MURPHY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOINT APPENDIX

DAVID C. VLADECK*
INSTITUTE FOR
PUBLIC REPRESENTATION
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JEFFREY J. SCHIRO
KUNTZ, SPAGNUOLO,
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(914) 234-6363

* *Counsel of Record*

PETITION FOR CERTIORARI FILED JUNE 27, 2005
CERTIORARI GRANTED JANUARY 6, 2006

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APPENDIX A — RELEVANT DOCKET ENTRIES OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

US COURT OF APPEALS FOR THE SECOND CIRCUIT

INDIV

CLOSED

Court of Appeals Docket #: 03-7850-cv
Nsuit: 3890 STATUTES-Other

Murphy v. Arlington Central

Filed 8/21/03

Appeal SDNY (NEW YORK CITY)
from:

Case type information:

Lower court information:

District: 99-cv-9294

Trial Judge: Charles S. Haight

MagJudge:

Date Filed: 08/30/99

Date order/judgement: 7/23/2003

Date NOA filed: 8/20/2003

Appendix A

Fee status: Paid

Panel Assignment:

Panel: JON RSP RAK

Date of decision: 3/29/05

Prior cases: NONE

Current cases NONE

Official Caption 1/

INDIV

CLOSED

Docket No. [s]: 03-7850

PEARL MURPHY, THEODORE MURPHY,

Plaintiffs - Appellees,

v.

ARLINGTON CENTRAL SCHOOL DISTRICT
BOARD OF EDUCATION,

Defendant - Appellant.

Appendix A

Authorized Abbreviated Caption 2/

Docket No. [s]: 03-7850

MURPHY V. ARLINGTON CENTRAL

1/ Fed. R. App. P. Rule 12 [a] and 32 [a].

2/ For use on correspondence and motions only.

Docket as of February 02, 2006 7:48 pm

INDIV

CLOSED

Public Citizen, Inc. Movant	David C. Vladeck Esq. [LD ret] Georgetown University Law, Center 600 New Jersey Ave. Center Washington , DC , 20001 202-662-9540
Arlington Central	Jeffrey J. Schiro Esq.
Defendant-Appellant	[ret] Law Office of Raymond G. Kuntz 444 Old Post Rd Bedford Village , NY , 10506 914-234-6363

Appendix A

Pearl Murphy	Pearl Murphy
Plaintiff-Appellee	n/a
	142 Reilly Rd. LaGrangeville , NY , 12540 914-223-3849
Arlington Central	Raymond G. Kuntz Esq.
Defendant-Appellant	[ret] Law Office of, Raymond G. Kuntz, Esq. 444 Old Post Rd Bedford Village , NY , 10506 914-234-6363

Docket as of February 02, 2006 7:48 pm

INDIV

CLOSED

Theodore Murphy	Theodore Murphy
Plaintiff-Appellee	n/a
	142 Reilly Rd. LaGrangeville , NY , 12540 914-223-3849

Appendix A

Docket as of February 02, 2006 7:48 pm

INDIV

CLOSED

8/21/03 Copy of notice of appeal and district court docket entries on behalf of Appellant Arlington Central filed. [03-7850] [DT]

8/21/03 Note: This appeal was PRO SE when filed. [DT]

* * *

8/21/03 Copy of district court memorandum & order dated 7/22/03, endorsed by Hon. Charles S. Haight, Sr. USDJ, RECEIVED. [03-7850] [DT]

* * *

4/26/04 Scheduling order #1 filed. Appellants brief due 5/26/2004. Appellees brief due 6/25/2004. Ready week 8/6/2004. Record on appeal due 5/6/2004. [EA]

4/26/04 Notice to counsel and pro se re: Scheduling order dated 4/26/04. [EA]

Appendix A

Docket as of February 02, 2006 7:48 pm

INDIV

CLOSED

5/6/04	Record on appeal index and clerk's certificate in lieu of record received. [EA]
	* * *
5/26/04	APPELLANT Arlington Central School District, brief FILED with proof of service. [EA]
5/26/04	APPELLANT Arlington Central School District, appendix filed w/pfs. [EA]
6/22/04	APPELLEE Pearl Murphy, Theodore Murphy, LETTER BRIEF filed with proof of service. [EA]
7/7/04	Public Citizen, Inc., amicus brief received. [EA]
7/8/04	Movant Public Citizen, Inc. motion participate and file brief as amicus curiae filed with proof of service. [EA]
7/13/04	Appellant Arlington Central motion extended time to file reply brief to July 23, 2004 filed with proof of service. [EA]

Appendix A

7/19/04	Order FILED REFERRING motion participate as amicus curiae by Movant Public Citizen, Inc., "to the merits panel." Endorsed by AMH on motion dated 7/13/2004. [EA]
	* * *
7/20/04	Order FILED GRANTING motion extended time to file reply brief until "July 23, 2004" by Appellant Arlington Central, endorsed by CJM on motion dated 7/13/2004. [EA]
7/23/04	APPELLANT Arlington Central School District Board of Education, reply brief filed with proof of service. [EA]
	* * *
10/22/04	Set for argument on December 16, 2004 B

Appendix A

Docket as of February 02, 2006 7:48 pm

INDIV

CLOSED

Panel [JC]

10/29/04 Public Citizen amicus brief filed with proof of service. [JC]

10/29/04 Order FILED GRANTING motion to file amicus brief by Movant Public Citizen, Inc., endorsed on motion dated 7/13/2004 [JC]

11/2/04 Notice to counsel in re: Order dated 10/29/04. [JC]

11/3/04 Movant Public Citizen, Inc. motion to participate in oral argument filed with proof of service. [EA]

11/12/04 Record on appeal after index filed. (1 vol) [VM]

11/17/04 Order FILED GRANTING motion for leave for Amicus Curiae to participate in oral argument by Movant Public Citizen, Inc., endorsed on motion dated 11/3/2004(FOR THE COURT-AV). [AV]

11/18/04 Notice to counsel in re:order granting motion for leave for amicus curiae to participate in oral argument. [AV]

Appendix A

12/7/04 MOVANT Public Citizen, Inc., 28(J) letter FILED. [EA]

12/16/04 Case heard before NEWMAN, POOLER, KATZMANN, C.JJ. [JC]

3/29/05 Judgment of the district court is AFFIRMED by published signed opinion filed. (RAK) [EA]

3/29/05 Notice to counsel and pro se re: Opinion dated 3/29/05. [EA]

3/29/05 Judgment filed. [EA]

* * *

Docket as of February 02, 2006 7:48 pm

INDIV

CLOSED

4/15/05 Amended published signed opinion filed. (RAK) [EA]

4/15/05 Notice to counsel and pro se re: Amended opinion dated 4/15/05. [EA]

4/15/05 AMENDED judgment filed [EA]

* * *

Appendix A

5/31/05	Judgment MANDATE ISSUED. CLOSED [EA]
5/31/05	Notice to counsel and pro se re: Mandate issued on 5/31/05. [EA]
6/6/05	Acco received in records room from team. Number of Volumes: 1 [CK]
7/11/05	Notice of filing petition dated 6/27/05 filed. Supreme Court #: 05-18. [PI]
1/24/06	Writ of Certiorari GRANTED: the petition for writ of certiorari is granted limited to Question one presented by the petition. [AC]

APPENDIX B — RELEVANT DOCKET ENTRIES OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK (FOLEY SQUARE)

U.S. District Court
Southern District of New York (Foley Square)
CIVIL DOCKET FOR CASE #: 1:99-cv-09294-CSH

Murphy, et al v. Arlington Central Bd
Assigned to: Judge Charles S. Haight
Demand: $0
Case in other court: USDC-NDNY, 99-cv-1258(TJM)
Cause: 20:1400 Civil Rights of Handicapped Child

Date Filed: 08/30/1999
Jury Demand: None
Nature of Suit: 890 Other
Statutory Actions
Jurisdiction: Federal Question

Plaintiff

Pearl Murphy
represented by **Pearl Murphy**
Reilly Road
Box 27
LaGrangeville, NY 12540
(914) 223-3849 PRO SE

Appendix B

Plaintiff

Theodore Murphy
represented by **Theodore Murphy**
Reilly Road
Box 27
LaGrangeville, NY 12540
(914) 223-3849 PRO SE

V.

Defendant

Arlington Central School District
Board of Education
represented by **Raymond G. Kuntz**
P.O. Box 396
Route 22
Hunting Ridge Mall, Suite 214
Bedford Village, NY 10506
(914) 234-6363 *LEAD ATTORNEY*

Appendix B

Date Filed	#	Docket Text
		* * *
01/22/2003	21	Memo-Endorsement on letter addressed to Judge Haight from Teddy Murphy, dated 01/13/03; Counsel is granted an additional month or February 13, 2003 for submission of certification and itemized bill regarding fees for Marilyn Arons ; (signed by Judge Charles S. Haight); (djc) (Entered: 01/24/2003)
02/19/2003	22	MEMORANDUM AND ORDER; that Arlington is directed to file and serve papers responding to plaintiff's claims on or before 3/7/03. If they wish to do so, plaintiffs may file and serve reply papers on or before 3/21/03. The Court will then regard the case as submitted for decision . (signed by Judge Charles S. Haight); (pl) (Entered: 02/25/2003)
03/12/2003	23	MEMORANDUM OF LAW by Arlington Central Bd. (sac) (Entered: 03/19/2003)
03/12/2003	24	AFFIDAVIT of Barbara J. Donegan by Arlington Central Bd in opposition to Pltffs' application for fees and costs. (sac) (Entered: 03/19/2003)

Appendix B

05/08/2003		Record on appeal files (00-7358) returned from U.S. Court of Appeals: [17-1] appeal by Arlington Central Bd (pr) (Entered: 05/08/2003)
07/23/2003	25	MEMORANDUM OPINION AND ORDER #88796, for the reasons stated, plaintiffs Pearl Murphy and Theodore Murphy are entitled to recover from defendant Arlington Central School Board of Education the sum of $8,650. The balance of plaintiffs' application for fees and costs in this action is denied. If the District does not pay this amount promptly, plaintiffs may ask this Court in writing (with a copy to counsel for the District) to enter judgment of this amount, so that post-judgment interest will begin to accrue. There is no occasion to consider pre-judgment interest, because plaintiffs are not out of pocket with respect to the allowed amount . (signed by Judge Charles S. Haight); (kw) Modified on 07/25/2003 (Entered: 07/25/2003)
08/20/2003	26	NOTICE OF APPEAL by Arlington Central Bd from [25-1] order for the reasons stated, plaintiffs Pearl Murphy and Theodore Murphy are entitled to recover from defendant Arlington Central School Board of Education the

		sum of $8,650. The balance of plaintiffs' application for fees and costs in this action is denied. If the District does not pay this amount promptly, plaintiffs may ask this Court in writing (with a copy to counsel for the District) to enter judgment of this amount, so that post-judgment interest will begin to accrue. There is no occasion to consider pre-judgment interest, because plaintiffs are not out of pocket with respect to the allowed amount . Copies of notice of appeal mailed to Attorney(s) of Record: Theodore Murphy and Pearl Murphy. $105.00 Appeal filing fee paid 8/20/03 on receipt # E 482618. (dt) (Entered: 08/20/2003)
08/20/2003		Notice of appeal and certified copy of docket to USCA: [26-1] appeal by Arlington Central Bd ; Copy of notice of appeal sent to District Judge. (dt) (Entered: 08/20/2003)
08/22/2003	27	NOTICE OF MOTION (filed on service date) by Arlington Central Bd for an order purs. to Rule 62(d) of the FRCP, granting defendant a stay of the Court's Memorandum Opinion and Order pending appeal, entered on the 23rd day of July, 2003 . Return Date 9/17/03 at 9:00. Affidavit of Barbara J. Donegan attached. (sb) (Entered: 09/03/2003)

Appendix B

09/02/2003	29	MEMORANDUM; that the Court will not consider dft's moiton for a stay until the record demonstates that proper security (for a Bond) has been lodged with the Clerk . (signed by Judge Charles S. Haight); (pl) (Entered: 09/05/2003)
09/04/2003	28	Notice that the record on appeal has been certified and transmitted to the U.S. Court of Appeals: [26-1] appeal by Arlington Central Bd. (dt) (Entered: 09/04/2003)
11/07/2003	30	BOND #CGB8720369, in the sum of $ 9,602.00 entered by Arlington Central Bd. (tp) (Entered: 11/17/2003)
11/17/2003	31	Memo-Endorsement on letter addressed to Judgement & Orders Clerk from Jeffrey J. Schiro, dated 11/5/03. Re: the District requests that, after your examination, that you approve and endorse the bond; the supersedeas bond endorsed with this letter is approved by the Court . (signed by Judge Charles S. Haight); (pl) (Entered: 11/18/2003)
05/06/2004	32	Appeal Record Sent to USCA (Index). Notice that the Original index to the record on Appeal for [26] Notice of Appeal,,, filed by Arlington Central

Appendix B

		School District Board of Education USCA Case Number 03-7850-cv, 3 Copies of the index, Certified Clerk Certificate and Certified Docket Sheet were transmitted to the U.S. Court of Appeals. (dt,) (Entered: 05/06/2004)
11/09/2004		Appeal Record Sent to USCA (File). Indexed record on Appeal Files for [26] Notice of Appeal, filed by Arlington Central School District Board of Education USCA Case Number 04-5571, were transmitted to the U.S. Court of Appeals to the attention of Vincenza Mathias. (tp,) (Entered: 11/09/2004)
06/03/2005	33	MANDATE of USCA (Certified Copy) as to [26] Notice of Appeal,,, filed by Arlington Central School District Board of Education, USCA Case Number 03-7850-cv. Ordered, Adjudged and Decreed that the order of the District Court is AFFIRMED. MACKECHNIE, Clerk USCA. Issued As Mandate: 5/31/05. (pr,) (Entered: 06/09/2005)
10/03/2005	34	ORDER that the motion by dft for a stay pending appeal is denied as moot, the court of appeals having issued its decision and mandate. (Signed by Judge Charles S. Haight on 9/30/05) (dle,) (Entered: 10/04/2005)

APPENDIX C — LETTER FROM PEARL AND THEODORE MURPHY REQUESTING ORDER THAT ARLINGTON CENTRAL SCHOOL DISTRICT PAY FOR CONSULTATION SERVICES OF MARILYN ARONS INCURRED BY PLAINTIFFS

Pearl and Teddy Murphy
142 Reilly Road
Lagrangeville, N.Y. 12540

January 13, 2003

Honorable Judge Haight, Jr.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

99 Civ.9294

RE: Murphy v. Arlington
RE: prevailing party fees

Dear Judge Haight,

As per your order regarding the fees for Marilyn Arons, please find her cover letter to me her certification and attached itemized bill. I am also forwarding this simultaneously to Jeffrey Schiro, esq.

I have attempted to calculate my husband and my out of pocket expenses pertaining to travel over the last four years of litigation. Because of the Christmas holidays and the continued needs of my son, I have been unable to complete and verify all mileage. Therefore I request an additional month or February 13, 2003 for me to submit this final piece of information. Thank you for your consideration.

Appendix C

Sincerely,

s/ Pearl Murphy
Pearl Murphy
s/ Teddy Murphy
Teddy Murphy

CC: Jeffrey Schiro, esq.
CC: File

Appendix C

Marilyn Arons, M.S.
210 Carlton Terrace
Teaneck, New Jersey 07666
201-692-3613

December 20, 2002

MEMORANDUM

TO: PEARL MURPHY
FROM: MARILYN ARONS
RE: FEE FOR SERVICE

As per your request, please find a complete bill for the consultation services provided to Joe. If there are any questions about its contents, do not hesitate to contact me. In addition, I have also included a Certification. This assures that the bill is accurate to the best of my ability, and that I am not charging for any legal services provided.

Appendix C

CERTIFICATION

I, Marilyn Arons, being of full age, do hereby certify that the following statements are true to the best of my ability. I am aware that if any of these statements are knowingly false, I am subject to punishment.

1. I am the Marilyn Arons who is referenced within *R.C. v. Borough of Palmyra Bd. Of Education*, 97-6119; (D.N.J. 1999; 31 IDELR 3). My established market value is $200 per hour.

2. I am the Marilyn Arons who is referenced within *Connors v. Mills*, 34 F. Supp. 2d 795; (N.D.N.Y. 1998). The attached bill for Joseph Murphy was made in accordance to my understanding of those areas for which the Second Circuit permits me to bill for services.

3. I was asked by Pearl Murphy to help her son receive an appropriate education in October of 1997. She explained her financial circumstances and the issues in her son's case as she understood them. She originally asked that I serve as an educational consultant in order to have an IEP developed in accordance with his needs. Because of the unusual nature of this case, as well as the fragile state of her sons development, I agreed to take the case on a contingency. A verbal contract was agreed upon in which the family agreed to seek my fees from the Arlington School District or a court of competent jurisdiction in the event there was litigation and the

family became the prevailing party. I have never received payment for any services provided since 1997. I have stayed with the case because of my concern for the social, emotional, academic and developmental welfare of Joseph, a child I deemed to be at significant risk without appropriate intervention.

s/ Marilyn Arons
Marilyn Arons, M.S.

Date: December 20, 2002

Appendix C

JOSEPH MURPHY CONSULTATION BILL
(By School Year)

Hourly Rate: $200

School Year 1997-1998

DATE	SERVICE	HOURS
11/1/97	Parent consultation, updated school history, record review	3
11/2/97	Development of current educational status/goals for IEP meeting	4
11/5/97	Attendance/participation at CSE meeting	5
12/3/97	Preparation for/attendance/ participational CSE meeting	3
1/8/98	Parent consultation re: placement of Joe at Kildonan	2
7/28/98	Parent consultation/development of parent input for Annual Review	1 1/2
8/23/98	Record review	1
8/24/98	Development of written summary of program issues for parent	2

Subtotal: 21 1/2 hours
Fee: $4,300

Appendix C

School Year 1998-1999

DATE	SERVICE	HOURS
9/23/98	Record review analysis for patterns of functioning	4 1/2
10/11/98	Review of Kildonan progress reports	1/2
10/21/98	Development of Petitioners Index	3
10/22/98	Parent conference	1
10/26/98	Review of Costello records/ Development of Costello questions	3
10/28/98	Parent Consultation re: Executive functioning	2
11/1/98	Record review re: Joes social, emotional development; review formal testing measures	3
11/8/98	Review of "When is a Language Disability not a Language Disability", Brooks/ Comparison of article to Joes language evaluations	4
11/9/98	Review of IEP meeting tapes/parent notes from IEP meetings	3 1/2

Appendix C

DATE	SERVICE	HOURS
11/17/98	Development of questions for Jennifer Jenson; Review of Ansley report and recommendations; Development of Ansley questions	5
12/9/98	Parent consultation re: impact of Arlington on Joe's self-image	1
3/20/99	Review of Brooks Follow-up note	1/2
4/8/99	Development of Brooks questions	1
4/10/99	Review of Brooks FAX note	1/4
4/11/99	Response to Brooks note	1/4
5/12/99	Development of Pearl Murphy questions	1 1/2
5/25/99	Review of Kildonan records; Development of Schantz questions	2
7/14/99	Parent conference/recommendations for 99-00 program	2
7/27/99	Review of Schepperly to Murphy letter; parent consultation	1
8/11/99	Parent Conference re: CSE meeting date	1/4

Appendix C

DATE	SERVICE	HOURS
8/23/99	Parent conference; development Annual Review of agenda	1
	Subtotal:	40 1/4
	Fee:	$8,050

School Year 1999-2000

9/4/99	Review/analysis of proposed 99-00 IEP; review of WIAT testing/ St. Francis speech-language evaluation	3
3/29/00	Review of school records	3
4/2/00	Development of Schepperly questions	4
4/4/00	Development of Levinsky questions	1 1/2
4/7/00	Parent conference re: Kildonan	1/2
5/6/00	Parent conference re: Joes return to Arlington	1
6/24/00	Parent conference; explanation of traumatic brain injury	1
6/25/00	Review of parent agenda for CSE meeting	1/2

Appendix C

DATE	SERVICE	HOURS
8/21/00	Parent conference re: IEP meeting/ Joes transition to Arlington	1/2
8/27/00	Parent conference re: return to Arlington	1/4
8/28/00	Review of parent FAX; parent conference re: supports needed at Arlington	1
8/29/00	Review of parent FAX; parent/student conference	1 1/2
	Subtotal:	17 3/4
	Fee:	$3,550

2000-2001 School Year

9/6/00	Parent/student conference re: home instruction; review of parent FAX, Donegan letters	2
9/9/00	Review of Costello letter/00-01 IEP, comparison to 99-00 IEP	3
9/10/00	Preparation of 9/11-15/00 lesson plans for Joe	3

Appendix C

DATE	SERVICE	HOURS
9/13/00	Review student FAX; student conference re: homework	1
9/17/00	Site visit to monitor lessons, review Joes work	1 1 /2
9/18/00	Review/correct assignment; Student conference; development of 9/18-22/00 lesson plans	3
9/22/00	Review of neurological update	1/2
10/15/00	Review parent FAX; parent conference	1/2
10/17/00	Review parent FAX, revised IEP, Donegan letter, Murphy to Donegan letter	1
10/22/00	Review Murphy to Donegan letter; Parent conference	1 1/2
12/19/00	Review of Donegan letters; Parent conference	1
12/27/00	Review of Hartwig neuropsychological; Comparison to prior neuropsychological	3

Appendix C

DATE	SERVICE	HOURS
12/28/00	Parent conference re: Joe's educational status	1/2
1/18/01	Home visit; accompanying Joe to Duchess Community College; Consultation as to courses	6
1/22/01	Parent consultation re: necessary transition elements for Joe; review of 1/22/01 Murphy letter	1 1/2
1/28/01	Review of parent FAX; development of parent agenda for CSE meeting	2
1/29/01	Review of parent FAX, parent/ student consultation re: CSE meeting	1/2
3/08/01	Review of WIAT testing/Donegan letters; parent conference	1
3/16/01	Review of CSE minutes	1/4
3/20/01	Parent/student consultation re: opinions on Joe's progress	1/2
5/4/01	Review of Healey neuropsychological	2

Appendix C

DATE	SERVICE	HOURS
5/5/01	Parent consultation re: Annual Review	1/2
5/18/01	Updated record review	2
5/22/01	Parent consultation re: credits for graduation; Joe's future	1 1/2
6/6/01	Parent consultation; development of CSE agenda	1/2
6/15/01	Parent consultation re: Joe's transition needs, ability to be independent	2
7/12/01	Record review; development of written parent report	3
8/6/01	Review/analysis of proposed 01-02 IEP	2

Subtotal: 45 3/4
Fee: $9,150

Appendix C

2001-2002 School Year

DATE	SERVICE	HOURS
9/5/01	Development of Petitioners Index	2
9/6/01	Conference call w/Diane Phalen at St. Francis Hospital re: Joe's language therapy needs	1/2
9/10/01	Conference call w/Director of St. Francis Communication Dept. re: Joe's therapy	1/4
9/18/01	Development of Costello/Donegan questions	5
9/21/01	Parent conference re: Joe's state of mind/future	2
9/23/01	Parent conference re: Joe's grand mal seizure	1
9/25/01	Parent consultation re: Joe's neurological status	1
10/12/01	Parent consultation re: changes needed in Joe's program/transportation	1
1/2/02	Development of Arons to Murphy letter	2

Appendix C

DATE	SERVICE	HOURS
1/19/02	Parent consultation re: IEP needs for Joe	1/4
7/18/02	Review of WIAT testing/Frontera statement; parent consultation to prepare for CSE meeting	1 1/2
7/19/02	Attendance/participation at Annual Review; parent/student conference	5
	Subtotal:	21 1/2
	Fee:	$4,300

Total Consultation Hours=125 1/2 Total fee: $29,350

APPENDIX D — LETTER FROM PEARL AND THEODORE MURPHY REQUESTING ORDER THAT ARLINGTON CENTRAL SCHOOL DISTRICT PAY MILEAGE EXPENSES INCURRED BY PLAINTIFFS

Pearl Murphy
142 Reilly Rd.
Lagrangeville
New York 12540

February 12, 2003

Honorable Judge Haight, Jr.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RE: Murphy v. Arlington
RE: prevailing party fees

Dear Judge Haight,

Please find attached the calculated out of pocket expenses pertaining to travel over the past four years of litigation. Thank you for your consideration.

Sincerely,

s/ Pearl Murphy
Pearl Murphy

CC: Jeffrey Schiro, esq.
CC: File

Appendix D

CERTIFICATION

I, Pearl Murphy, being of full age, do hereby certify that the following statements are true to the best of my ability. I am aware that if any of these statements are knowingly false, I am subject to punishment.

1. The mileage rate of 36.5 cents per mile for calculated out of pocket expenses pertaining to travel over the past four years of litigation.

s/ Pearl Murphy
Pearl Murphy

Date: February 11, 2003

Appendix D

Mileage expense
Marilyn Arons Transportation

11/1/97	162.76 miles	36.5 cents per mile
11/5/97	325.52 miles	36.5 cents per mile
12/3/97	325.52 miles	36.5 cents per mile
10/28/98	325.52 miles	36.5 cents per mile
11/2/98	325.52 miles	36.5 cents per mile
11/18/98	325.52 miles	36.5 cents per mile
11/20/98	325 52 miles	36.5 cents per mile
12/9/98	162.76 miles	36.5 cents per mile
12/10/98	162.76 miles	36.5 cents per mile
4/12/98	325.52 miles	36.5 cents per mile
6/2/98	325.52 miles	36.5 cents per mile
81.38 miles each way		(Krouner Hearing)
12/16/00	325.52 miles	36.5 cents per mile
4/3/00	162.76 miles	36.5 cents per mile
4/5/00	162.76 miles	36.5 cents per mile
5/3/00	325.52 miles	36.5 cents per mile
6/5/00	162.76 miles	36.5 cents per mile
6/6/00	162.76 miles	36.5 cents per mile

Kaufman Hearing

Appendix D

1/18/01	325.52 miles	36.5 cents per mile
Visited the Dutchess program		
5/22/01	325.52 miles	36.5 cents per mile
6/15/01	325.52 miles	36.5 cents per mile
7/19/01	325.52 miles	36.5 cents per mile
Annual Review		

Farago Hearing

Total for Marilyn Arons transportation: $6.161.22

Dr. Brooks Speech and language therapy

10/15/97	29.94 miles	36.5 cents per mile
10/16/97	29.94 miles	36.5 cents per mile
10/20/97	29.94 miles	36.5 cents per mile
10/22/97	29.94 miles	36.5 cents per mile
10/29/97	29.94 miles	36.5 cents per mile
10/31/97	29.94 miles	36.5 cents per mile
11/3/97	29.94 miles	36.5 cents per mile
11/10/97	29.94 miles	36.5 cents per mile
11/17/97	29.94 miles	36.5 cents per mile
11/21/97	29.94 miles	36.5 cents per mile
11/24/97	29.94 miles	36.5 cents per mile

Appendix D

12/1/97	29.94 miles	36.5 cents per mile
12/3/97	29.94 miles	36.5 cents per mile
12/12/97	29.94 miles	36.5 cents per mile
12/17/97	29.94 miles	36.5 cents per mile
12/22/97	29.94 miles	36.5 cents per mile

14.29 miles each way
Total mileage cost: $366.21

Dr. Frontera Kingston Neurological

9/23/97	82.58 miles	36.5 cents per mile
11/18/97	82.58 miles	36.5 cents per mile
12/30/97	82.58 miles	36.5 cents per mile
8/4/98	82.58 miles	36.5 cents per mile
10/20/98	82.58 miles	36.5 cents per mile
12/22/98	82.58 miles	36.5 cents per mile
11/23/99	82.58 miles	36.5 cents per mile
9/19/00	82.58 miles	36.5 cents per mile
10/23/01	82.58 miles	36.5 cents per mile
2/19/02	82.58 miles	36.5 cents per mile
5/29/02	82.58 miles	36.5 cents per mile
7/16/02	82.58 miles	36.5 cents per mile

Appendix D

9/10/02	82.58 miles	36.5 cents per mile
1/7/03	82.58 miles	36.5 cents per mile

41.26 miles each way
Total mileage cost $1200.36

Dr. Harwood Neurologist

11/29/00	21 miles	36.5 cents per mile
12/3/00	21 miles	36.5 cents per mile
12/10/00	21 miles	36.5 cents per mile
12/17/00	21 miles	36.5 cents per mile

Total mileage cost $45.36

Dr. Jane Haley Neuro. Report

3/01	137 miles	36.5 cents per mile

68.69 miles each way
Total mileage cost $73.98

Total $ 7847.14

APPENDIX E — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED FEBRUARY 13, 2003

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

99 Civ. 9294 (CSH)

PEARL MURPHY AND THEODORE MURPHY,

Plaintiff

-against-

ARLINGTON CENTRAL SCHOOL DISTRICT BOARD OF EDUCATION,

Defendant.

MEMORANDUM AND ORDER

HAIGHT, *Senior United States District Judge*:

Plaintiffs Pearl and Theodore Murphy, parents of Joseph Murphy, a "child with a disability" within the meaning of the Individuals with Disabilities Education Act ("the IDEA"), 20 U.S.C. §§ 1400 *et seq.*, were the prevailing parties in an action they commenced under that statute against defendant Arlington Central School District Board of Education ("Arlington") to require Arlington to assume financial responsibility for their child's tuition at a private school during certain school years. The Court of Appeals affirmed this Court's judgment in plaintiffs' favor. *Murphy v. Arlington Central School District Board of Education*, 297 F.3d 195 (2d Cir. 2002).

Appendix E

Plaintiffs now ask this Court for a further order directing Arlington to pay costs they incurred during the administrative proceedings before the local educational agency and this litigation. Specifically, plaintiffs seek to recover the fees of Marilyn Arons, M.S., an educational consultant, and mileage expenses plaintiffs incurred in transporting Joseph to and from Arons' office, the offices of neurologists and speech therapists, and administrative hearings. According to the documents plaintiff submit in support of their claims, Arons devoted 125.5 "consultation hours" to the case. At her hourly rate of $200, plaintiffs' claim in respect of Arons' services is $29,350.[1] Plaintiffs' mileage claim totals $7,847.14 and is based upon a rate of 36.5 cents per mile.

The IDEA's fee-shifting provision states that "[i]n any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents of a child with a disability who is the prevailing party." 20 U.S.C. § 1415(i)(3)(B). While the statute does not specify what falls within allowable costs, a prevailing parent's entitlement is construed broadly, and courts routinely allow the sort of expenses claimed by plaintiffs at bar. *See, e.g., B.K v. Toms River Board of Education*, 998 F.Supp. 462, 476 (D.N.J. 1998) ("Congress usually does not intend for the fees or costs of experts to be awarded as part of a reasonable attorney's fee. However, the statute in this case is an exception.

1. Arons' "certification" accompanying plaintiffs' claim states: "Because of the unusual nature of this case, as well as the fragile state of [the Murphys'] son's development, I agreed to take the case on a contingency. A verbal contract was agreed upon in which the family agreed to seek my fees from the Arlington School District or a court of competent jurisdiction in the event there was litigation and the family became the prevailing party."

Moreover, courts have awarded expenditures such as photocopying, *travel*, long distance telephone and postage to prevailing IDEA plaintiffs as part of their attorneys' fee award." (citations and internal quotation marks omitted) (emphasis added).

This case presents an anomaly because the plaintiffs are not in a position to claim an award for attorneys' fees, at least with respect to the administrative proceedings and the litigation before this Court. That is because the Murphys did not retain an attorney to assist them during those stages, at which the Murphys conducted Joseph's case *pro se* (they were represented by counsel in the Court of Appeals).[2] They should not have been permitted to do so in this Court; as the Court of Appeals observed, "[i]n this Circuit, a non-attorney parent is precluded from representing his or her child in federal court." 297 F.3d at 201. Counsel for Arlington, having failed to object to plaintiffs' *pro se* status in this Court and disappointed by the judgment in plaintiffs' favor, urged it as an alternate basis for reversal in the Court of Appeals, which made short shrift of the argument, finding no reversible error. Judge Sotomayor's opinion observes that the purpose of the rule against parental *pro se* representation "is to protect the interests of minor children by ensuring they receive adequate representation," and added. "It is hardly in the best interest of Joseph Murphy to vacate an injunction that inures to his benefit so that he may re-litigate this issue below with licensed representation in order to re-secure a victory already obtained." *Id.*

2. The report of the case identifies Edward A. Acito as counsel for plaintiffs-appellees on the appeal. Plaintiffs' present claim does not include any fee of appellate counsel, although it would appear to be recoverable under the authorities cited in text. Plaintiffs may supplement their claim in this regard if the circumstances would support it.

In recalling this procedural history, I intimate no view on whether costs that would seemingly be recoverable as an additional element in a claim for attorneys' fees are recoverable as stand-alone items when attorneys' fees were not incurred.

Arlington may agree to pay these costs, or contest them with respect to liability, amount, or both, In the latter event, Arlington is directed to file and serve papers responding to plaintiff' claims on or before March 7, 2003. If they wish to do so, plaintiffs may file and serve reply papers on or before March 21, 2003.[3] The Court Will then regard the case as submitted for decision.

It is SO ORDERED.

Dated: New York, New York
February 13, 2003

s/ Charles S. Haight, Jr.
CHARLES S. HAIGHT, JR.
SENIOR UNITED STATES DISTRICT JUDGE

3. Since § 1415(i)(3)(B) allows payment of costs "*to the parents* of a child with a disability who is the prevailing party" (emphasis added), the Murphys are the parties in interest on this aspect of the case, and may proceed *pro se*.

APPENDIX F — AFFIDAVIT OF BARBARA J. DONEGAN IN OPPOSITION TO PLAINTIFFS' APPLICATION FOR FEES AND COSTS DATED MARCH 6, 2003 WITH EXHIBITS

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK

99 Civ. 9294 (CSH)

Hon. Charles S. Haight, Jr.

PEARL MURPHY and THEODORE MURPHY,

Plaintiffs,

- against -

ARLINGTON CENTRAL SCHOOL DISTRICT BOARD OF EDUCATION

Defendant.

AFFIDAVIT OF BARBARA J. DONEGAN IN OPPOSITION TO PLAINTIFFS' APPLICATION FOR FEES AND COSTS

Appendix F

STATE OF NEW YORK)
) ss.:
COUNTY OF DUTCHESS)

BARBARA J. DONEGAN, being duly sworn, deposes and says:

1. I am the Assistant Superintendent for Pupil Personnel Services for the Arlington Central School District (the "District") and I have served the District in this capacity for all times relevant to this matter. I am fully familiar with the facts and circumstances surrounding the parents' application. I make this Affidavit in opposition to the plaintiffs' application for fees and costs.

2. Federal and state law assures that all children with disabilities have available to them a free appropriate public education designed to meet their unique learning needs. As the Assistant Superintendent for Pupil Personnel Services, I supervise the District's Committee on Special Education (the "CSE"). The primary mission of the CSE is to identify, locate, and evaluate all disabled children within the District's borders and develop individualized education programs ("IEP's") that address their educational needs.

3. In an application dated January 7, 2003, supplemented on January 13, 2003, and again on February 12, 2003, the parents have requested that this Court direct the District to pay fees and costs they incurred during the administrative proceedings and federal litigation.

4. Specifically, the parents seek to recover the fees of Marilyn Arons, a non-lawyer advocate, and milage expenses

that Ms. Arons and the parents incurred. The District opposes the parents' fees and costs application.

5. The District does not challenge that the parents' are prevailing parties in this matter. Were the parents represented by counsel in these proceedings, their status as prevailing parties would entitle them to reimbursement of reasonable attorneys' fees and costs associated with the litigation. Here, however, the parents were "represented" at the impartial hearing by a non-lawyer advocate, they ignored the administrative appeal before the State Review Officer (the "SRO"), and proceeded *pro se* before this Court.

6. Ms. Arons' fees and costs cannot be recovered as a lawyer, expert, or litigation consultant. Ms. Arons is not licensed to practice law in this State or any other. At no level of these proceedings did Ms. Arons provide any testimony, expert or otherwise. Upon information and belief, Ms. Arons also lacks any specialized training in courtroom practice and procedure.

7. Similarly, the Court should deny or substantially reduce the amount of fees and costs claimed by Ms. Arons as an educational consultant because: (1) Ms. Arons' time records are inadequate; (2) the requested hourly rate is unreasonable; and (3) the CSE meetings for which Ms. Arons seeks fees and costs were not convened as a result of any administrative proceeding or judicial action.

Appendix F

STATEMENT OF THE CASE

8. The underlying matter from which this claim stems was for reimbursement for the unilateral placement of Joseph by his parents during the 1998/99 school year in a private institution that exclusively services disabled students.

9. Joseph's parents unilaterally enrolled him in the Kildonan School in Amenia, New York prior to a scheduled meeting of the CSE held on July 30, 1998.

10. By letter dated September 3, 1998, Joseph's parents requested an impartial hearing to determine whether or not the District should be required to reimburse them for the costs associated with the unilateral placement of their son in a private school along with costs associated with private speech therapy.

11. Thereafter, the District appointed Impartial Hearing Officer Leonard W. Krouner (the "IHO") from the State's list of certified hearing officers to serve as the hearing officer in this matter.

12. After a lengthy hearing, the IHO determined that the District had not afforded Joseph a free appropriate public education, held that Joseph's parents appropriately placed him at Kildonan, and awarded Joseph's parents reimbursement for private speech therapy.

13. Since his service in this matter, Mr. Krouner has plead guilty in Albany County (NY) to multiple charges of fraud for collecting disability insurance while also serving

as an impartial hearing officer. Mr. Krouner, who has previously been disciplined for unethical conduct, will surrender his law license (Def. Exs. A, B).

14. By petition dated August 17, 1999, the District sought review of the IHO's determination by the SRO as provided by the New York Education Law.

15. Rather than answer the allegations made in the District's petition, the parents filed an action for injunctive relief on August 6, 1999 in the District Court for the Northern District of New York.

16. The Honorable Thomas J. McAvoy, in a decision dated August 12, 1999, transferred the matter to the District Court for the Southern District of New York because the parents' claims arose, and all the parties reside in, the southern district.

17. Following the transfer to the southern district, the case was assigned to the Honorable Charles S. Haight, Jr. His Honor's chambers called the District's counsel and stated that the matter was being referred to a magistrate and disclosed that His Honor was the parent of a disabled student and had sued his public school district in the past over his child's education.

18. The matter was referred to Magistrate Judge Frank Maas who, after a pretrial conference on September 8, 1999, recommended that the parents' case be dismissed for lack of subject matter jurisdiction.

Appendix F

19. After the receipt of the parents' objections to Magistrate Judge Maas' report, the Court raised several questions, on its own motion, as to the timeliness and integrity of the administrative remedies in this matter and ordered the District to explain the relative merits of its administrative appeal through a series of interrogatories.

20. The Court did not add the New York State Education Department ("SED") as a party to this action, but instead, granted SED leave to submit a brief *amicus curiae* if so advised.

21. The District advised SED of the action, but it declined to appear.

22. Notwithstanding this declination, the District and SED have never been united in interest for purposes of these proceedings.

23. After reviewing the parties' responses to its interrogatories, the Court acknowledged that the District had timely filed its administrative appeal, but continued to reserve its decision on Magistrate Judge Maas' Report.

24. Stating that the SRO's delay in rendering a decision "cannot be tolerated," the Court retained jurisdiction over the matter and warned that it "will [not] hesitate to adjudicate Plaintiffs' claims for equitable relief if the SRO fails to reach a final decision by December 20, 1999."

25. Against this backdrop, on December 14, 1999, the SRO sustained the IHO's determination to award the parents

tuition reimbursement for their unilateral placement of Joseph in Kildonan for the 1998/99 school year.

26. The SRO, however, reversed the IHO's decision to reimburse the parents for private speech/language therapy they had secured during the 1997/98 school year.

27. Upon learning through status reports submitted by the parties that the SRO had filed a decision and order in the matter, the Court dismissed, as moot, the parents' complaint in a Memorandum and Order dated January 3, 2000.

28. In so doing, the Court expressly declined the parents' request that it issue a declaratory ruling "'regarding whether pendency occurs at the IHO or the SRO level'."

29. In a Memorandum and Order of January 11, 2000, the district court reiterated its dismissal of the parents' action and its refusal to decide the issues "not presently before the court."

30. Subsequent to the district court's January 3rd and January 11th Orders, the parents filed what they termed a "motion to compel," seeking not only reimbursement for their unilateral private placement of their son during the 1998/99 school year, but also payment for their son's private placement during the 1999/00 school year.

31. On its own motion, the Court converted the parents' "motion" into an ex *parte* application for an order to show cause.

32. The Court explained this reversal of position as "according plaintiffs' papers the lenity traditionally extended to *pro se* pleadings."

33. After reviewing submissions by the parties made in response to a second set of judicial interrogatories, the Court rendered a Memorandum Opinion and Order on March 1, 2000.

34. In its opinion, the Court interpreted the relevant statutory and regulatory framework to find that the Joseph's "stay-put" or pendency placement was, for all times relevant to the complaint, the private school he attended during the 1998/99 school year.

35. The Court of Appeals affirmed the district court's judgement in plaintiffs' favor.

36. On or about July 30, 2002, the parents supplied the Court of Appeals with a itemized and verified bill of costs (including a consultation fee claim of $500 for Ms. Marilyn Arons and $5,000 in attorneys' fees) for which they sought reimbursement by the District (Def. Ex. C).

37. In an Order filed on September 10, 2002, the Court of Appeals disallowed the parents itemized and verified bill of costs (Def. Ex. D).

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THE PARENTS' CLAIM FOR FEES AND COSTS

38. Ms. Arons' fees and costs cannot be recovered as a lawyer, expert, or litigation consultant.

39. Ms. Arons does not possess a license to practice law in the State of New York.

40. Ms. Arons did not give any expert testimony at any stage of these proceedings.

41. Upon information and belief, Ms. Arons has no specialized training in courtroom practice and procedure.

42. The Court should deny the parents' request for reimbursement for Ms. Arons' development of questions for witnesses at the impartial hearings.[1]

43. Reimbursement for these items is prohibited because Ms. Arons lacks a license to practice law and has no specialized training in courtroom practice and procedure for which she could be reimbursed as a litigation consultant.

44. The Court should deny or substantially reduce the amount of fees and costs claimed by Ms. Arons as an educational consultant because her time records are inadequate.

---

1. The District refers to entries from the parents' January 13, 2003 supplement for the following dates: October 21, 1998, October 26, 1998, November 17, 1998, April 8, 1999, May 12, 1999, May 25, 1999, April 2, 2000, April 4, 2000, September 5, 2001, September 18, 2001.

Appendix F

45. In connection with this lawsuit, the parents seek reimbursement for 125 1/2 hours of educational consultant time through June 2002.

46. Ms. Arons' December 20, 2002 Certification is the first instance in which the District has hearing Ms. Arons refer to herself as an "educational consultant." Throughout the impartial hearing before IHO Krouner, Ms. Arons insisted that she be referred to as a "non-lawyer representative."

47. Neither the parents nor Ms. Arons have provided the Court with contemporaneous time sheets or computer records to support this part of their application.

48. Instead, the parents have presented the Court with a December 20, 2002 Certification by Ms. Arons as what services she believes she provided them with in the past.

49. Without contemporaneous record keeping, it is difficult, if not impossible, to evaluate the reasonableness of the hours claimed by Ms. Arons.

50. While in other circumstances, i.e., if the parents had been represented by counsel in the federal action, the Court could cure the lack of contemporaneous record keeping with a review of the extent and quality of submissions made to the Court, here, no such substitution is possible because Ms. Arons never appeared (assuming, for purposes of argument, that she could) before this Court.

51. The Court should deny or substantially reduce the amount of fees and costs claimed by Ms. Arons as an educational consultant because the requested hourly rate is unreasonable.

Appendix F

52. In her December 20, 2002 Certification, Ms. Arons quotes her "established market value" as $200 per hour.

53. How Ms. Arons established this market value is a mystery. Unlike experienced litigators, there is no market for non-lawyer advocates or educational consultants.

54. There is no license sponsored by the State of New York to practice as an educational consultant.

55. The State of New York does not recognize nor authorize non-lawyers to represent parents or children in special education proceedings.

56. No substitute evidence of skill, expertise, and experience has been offered by Ms. Axons or the parents to justify Ms. Arons' alleged "market value."

57. The Court should deny or substantially reduce the amount of fees and costs claimed by Ms. Arons as an educational consultant because the CSE meeting for which Ms. Arons seeks fees and costs were not convened as a result of any administrative proceeding or judicial action.

58. Even if the Court chooses to equate the work of licensed attorneys with that of unlicensed educational consultants, many of Ms. Arons' claimed hours involve activity unrelated to the federal action previously before this Court.

59. According to her December 20, 2002 Certification, nearly 40 of the 125 1/2 hours claimed by Ms. Arons concern her preparation, attendance, and participation at CSE meetings for Joseph between the 1997/98 school year and the 2001/2002 school year.

Appendix F

60. The action before this Court concerned the rights and liabilities of the parties in light of Joseph's unilateral placement during the 1998/99 school year.

61. The only compensable fees and costs of Ms. Arons are those arising during that school year or those that resulted from this Court's March 1, 2000 Memorandum Opinion and Order.

62. None of the CSE meetings referenced in Ms. Arons' Certification resulted from this Court's March 1, 2000 Memorandum Opinion and Order.

63. Instead, they resulted from the District's continuing obligation under federal and State law to develop an appropriate program for Joseph that would be reasonably calculated to meet his unique learning needs in the least restrictive environment.

64. For similar reasons, the Court should deny the parents reimbursement for Ms. Arons' milage expenses from December 16, 2000 through July 19, 2001.

65. These expenses were incurred by Ms. Arons in the context of hearings unrelated to the matter before this Court and/or CSE meetings that were convened by the District in accordance with continuing obligations under federal and State law.

66. Likewise, should the Court dismiss, as unrecoverable, Ms. Arons' charges from the hearing before IHO Leonard W. Krouner, her milage charges for November 1, 1997 through June 2, 1998 should also be dismissed.

67. Ms. Arons' November 9, 1998 charge for review of a scholarly article should not be reimbursed because such review

amounts to professional development, which, like overhead, is not recoverable.

68. Lastly, in light of the fact that both the SRO and this Court dismissed the parents' claim for private speech/language therapy secured by the parents during the 1997/98 school year, their milage claims from October 15, 1997 through December 22, 1997 should be similarly dismissed.

CONCLUSION

69. Ms. Arons' fees and costs cannot be recovered as a lawyer, expert, or litigation consultant as a matter of law.

70. The Court should also deny or substantially reduce the amount of fees and costs claimed by Ms. Arons as an educational consultant because: (1) Ms. Arons' time records are inadequate; (2) the requested hourly rate is unreasonable; and (3) the CSE meetings for which Ms. Arons seeks fees and costs were not convened as a result of any administrative proceeding or judicial action.

s/ Barbara J. Donegan
Barbara J. Donegan

Sworn to before me this 6th
day of March, 2003.

s/ [illegible]
Notary Public

Appendix F

EXHIBIT A

[Intentionally omitted]

Appendix F

EXHIBIT B

[Intentionally omitted]

Appendix F

EXHIBIT C

[Intentionally omitted]

Appendix F

EXHIBIT D

[Intentionally omitted]

APPENDIX G — LETTER FROM PEARL AND THEODORE MURPHY RESPONDING TO ARLINGTON CENTRAL SCHOOL DISTRICT'S OBJECTION TO PLAINTIFFS' APPLICATION FOR REIMBURSEMENT OF CONSULTATION EXPENSES AND MILEAGE

Pearl Murphy
142 Reilly Rd.
Lagrangeville, New York 12540

March 19, 2003

Honorable Judge Haight, Jr.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RE: Murphy v. Arlington
RE: prevailing party fees

Dear Judge Haight,

Please find our response pertaining to Arlington's position on our claim for fees.

Sincerely,

s/ Pearl Murphy
Pearl Murphy

CC: Jeffrey Schiro, esq.
File

Appendix G

CERTIFICATION

I, Pearl Murphy being of full age, do by certify that the following statements are true to the best of my ability. I am aware that if any of these statements are knowingly false, I am subject to punishment.

1. I have read the affidavit of Barbara Donegan and the memorandum of law of Jeffrey Schiro in response to our claim for fees.

2. My dispute with Arlington began in 1997-98 school year concerning the refusal of the CSE to address our sons language needs in his IEP. As early as October of 1997 I was trying to get the school to use the input of Mr. Brooks and allow me to attend the meeting Mr. Brooks had with the school staff. Because of the schools actions toward me and their refusal to meet Joey's needs, I sought out Mrs. Arons.

3. Because Joey was not getting the services he needed and because we thought we had to prepare for a hearing, I met with Mrs. Arons on 11/1/97 and explained our case to her. As a result she dictated my letter to the school district which was received on 11/4/97. All actions concerning Joey and our efforts to obtain appropriate services started with the 11/1/97 meeting with Mrs. Arons.

4. Mrs. Arons was not a licensed driver, which she explained to us on our 11/1/97 meeting. Therefore, in order to receive her consultation and representation we either had to drive her round trip or hire a taxi service. It was cheaper for us to drive her. We have received Mrs. Arons bill. It reflects only

about a third of the time she provided to us and Joey. Her bill does not seek any consulting fees for matters relating to the second circuit appeal.

5. We have contacted our attorney Richard Acito about his bill. He told us that he had applied for fees to the second circuit on the work he had done on the districts appeal of our decision. His request for fees was denied. Therefore, no fees for Mrs. Arons or Mr. Acito are reflected in our request for fees.

s/ Pearl Murphy
Pearl Murphy

March 19, 2003

APPENDIX H — SUPPLEMENTAL CERTIFICATION DATED MARCH 18, 2003

SUPPLEMENTAL CERTIFICATION

I, Marilyn Arons, do hereby certify that the following statements are true to the best of my ability. I am aware that if any of these statements is knowingly false, I am subject to punishment.

1. I have been asked by Pearl Murphy to read the Affidavit of Barbara Donegan in opposition to payment of my fees relative to factual accuracy. I have done so and find several errors in her sworn statements.

2. In my original certification I provided the case law concerning my market value and the areas for which I was permitted to charge in *Connors*. It is apparent that Mrs. Donegan has not had the opportunity to read those opinions or to inquire about them, or she could not have made the statements she did in her affidavit

3. My bill is a minimal reflection of the number of hours and degree of work that I provided the Murphys relating to their son's needs, and includes no billing that I understand to pertain the work attornies do. Relative to the questions asked at hearings, it is my experience that special educators write those questions for the attornies involved because attornies do not understand the implications of diagnostic reports or the contents of IEPs. During the Murphy hearings, I observed Mr. Schiro to ask the members of the Arlington CSE about the meaning of test results, and the staffs' development of questions for him to ask about these and related matters. I did not need such consultation because of

being a special educator, and, as such, billed for the development of questions for witnesses in the three hearings conducted in this matter.

4. It is asserted that my time records are inadequate. I log the time in chronological order, writing hours on the back of the actual pupil record I have read or developed. When doing record reviews or those functions that do not result in the generation of a document, individual billing notes are placed in the file when I take a case on a contingency basis. In matters that are a direct fee for service, a billing sheet is kept. I do not do this for such cases as the Murphys because there is a chance that no bill will be required if the parent does not prevail. The documentation is kept contemporaneously with the time that the service was provided. This file is extremely large, but I am glad to produce those records if requested.

5. Mrs. Murphy first came to me regarding the disputed bill on 11/1/97. At that time she indicated that she had a serious dispute with her school district over her son's language needs for which she was privately paying for language therapy. My task was to figure out what her son needed and to make the district recognize his needs for language therapy. I advised her to utilize the IEP process first because that was the place to try and resolve the disputes. I reviewed pupil records, prepared a document and actively participated in an IEP meeting on 11/5/97 for the purpose of either resolving the problem or to utilize appropriate procedural safeguards. That first IEP meeting was the basis for everything that followed in the years leading to the present time.

Appendix H

6. I do have specialized training in courtroom practice and procedure through the Office of Administrative Law in New Jersey. However, none of that training is utilized in this bill or in any bill in that I am not permitted to charge attorney's fees as a nonlawyer.

7. No fees have been charged for any consultation with Richard Acito, Esq., the attorney who represented the Murphys in the Second Circuit appeal. Mr. Acito applied for fees in that case, seeking $500 for me. That application was rejected. As a result of that Second Circuit ruling, I attempted to be particularly careful not to consider any time pertaining to that appeal in my bill.

8. The Murphy case had three hearings, one after the other. Often there were four layers of litigation occurring at the same time, impartial hearing, Supreme Court, Appellate Court, and Federal Court. Throughout, Joseph and his parents tried to get his special needs met. From the beginning I had suspected some form of seizure disorder because of his behavior and affect. He was a gentle, sweet young man, extremely vulnerable, without the kind of "street smarts" he needed to survive. I was his contact when he was frightened, when he wanted to talk about school, when he was angry about what he perceived to be the injustice done to him. I was the only person outside of his parents that he had to talk to or to confide in. The school district's actions against him frightened him and confused him. I was his support person until he recently began to receive private therapy. None of that time is

reflected in my bill. That bill includes only those services that are documented in my billing file.

9. Mrs. Donegan, at #67 of her affidavit, objects to my review of a scholarly article on 11/9/98. My bill reflects that service to be done on 11/8/98. (A copy of that article is attached to this certification.) The article was given to me by Mrs. Murphy, who had received it from Gerry Brooks. Mrs. Murphy did not understand it and asked nee to read it and explain it to her. I did.

10. There has been an issue raised about paying Mrs. Murphy for transporting me to and from Arlington. I have not been a licensed driver since 1968. Every parent who used my services since 1977 either paid for private trar.sportation, paid for train or plane, or did the driving themselves. Each time I had to come to Arlington, Mr. Murphy drove to Teaneck to get me, drove us back to Arlington, brought me back to Teaneck, and then drove home. Unless this had been done, I could not have provided any service to this family.

March 18, 2003

s/ Marilyn Arons

APPENDIX I — LETTER FROM ARLINGTON CENTRAL SCHOOL DISTRICT OBJECTING TO PLAINTIFFS' APPLICATION FOR REIMBURSEMENT OF CONSULTATION EXPENSES AND MILEAGE

RAYMOND G. KUNTZ, P.C.
Attorneys at Law

March 26, 2003

Hon. Charles S. Haight, Jr.
United States Courthouse
Foley Square, Room 1940
New York, New York 10007

Re: Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ.
99 Civ. 9294 (CSH)
Our File No. ARL 6.420N

Dear Judge Haight:

We are the attorneys for the Arlington Central School District Board of Education (the "District") in the above captioned matter.

In that capacity, we are in receipt of a plaintiffs' reply papers concerning their fee application. Rather than reiterate the entirety of the District's objections to the parents' fee application, we wish to direct the Court's attention to the following limited points:

- New York State regulations do *not* presently recognize or authorize lay advocates to *represent* parents at special education due process hearings. *Compare* N.Y.

Appendix I

Comp. Codes R. & Regs. tit. 8(A-1), § 200.5(i)(3)(vii) (2002) *with* N.Y. Comp. Codes R. & Regs. tit. 8(A-1), § 200.5(c)(5) (1998).

- Although favorably cited by the plaintiffs, the Court in *Connors v. Mills* unequivocally held that fee shifting provision of the Individuals with Disabilities Education Act does *not* include within its scope the fees of a non-attorney advocate. *See Connors v. Mills*, 34 F. Supp.2d 795, 808 (N.D.N.Y. 1998).

- While the Court in *Connors* speculates, in *dicta*, that Ms. Arons may be able to recover her fees as an educational consultant, no such theory of recovery is countenanced under federal or state law.

- Ms. Arons' admission, in her March 18, 2003 Supplemental Certification, that she has failed to keep contemporaneous billing records for her activity in this matter preclude her recovery for such activity as an educational consultant,

To:

Mr. & Mrs. Theodore Murphy, *pro se*
RD 3, Box 275, Reilly Road
LaGrangeville, New York 12540

APPENDIX J — AFFIDAVIT OF BARBARA J. DONEGAN IN SUPPORT OF DEFENDANT'S APPLICATION FOR A STAY PURSUANT TO RULE 62(d)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

99 Civ. 9294 (CSH)

Hon. Charles S. Haight, Jr.

PEARL MURPHY and THEODORE MURPHY,

Plaintiffs,

- against -

ARLINGTON CENTRAL SCHOOL DISTRICT
BOARD OF EDUCATION

Defendant.

AFFIDAVIT OF BARBARA J. DONEGAN IN SUPPORT OF DEFENDANT'S APPLICATION FOR A STAY PURSUANT TO RULE 62(d)

STATE OF NEW YORK)
) ss.:
COUNTY OF DUTCHESS)

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BARBARA J. DONEGAN, being duly sworn, deposes and says:

1. I am the Assistant Superintendent for Pupil Personnel Services for the Arlington Central School District (the "District") and I have served the District in this capacity for all times relevant to this matter. I am fully familiar with the facts and circumstances surrounding the District's application. I make this Affidavit in support of the District's application for a stay of the Court's July 22, 2003 Memorandum Opinion and Order pending appeal.

2. The Court's Order concerned the entitlement of the plaintiffs, parents of a disabled child who successfully sued the District to recover their child's tuition at a private school during certain school years, to recover costs incurred for the services of an educational consultant and transportation costs incurred by plaintiffs during the pertinent times.

3. Applying the fee-shifting provisions of the Individuals with Disabilities Education Act, 20 U.S.C. § 1400, *et. seq.*, (the "IDEA") the Court ordered the District to pay certain fees of an educational consultant, at a rate of $200/hour, secured by the parents for litigation purposes.

4. On August 20, 2003, the District filed a Notice of Appeal of the Court's July 22, 2003 Memorandum Opinion and Order with the Clerk of the Court of the United States District Court for the Southern District of New York.

5. The issue of whether the services of an educational consultant are compensable under the IDEA's attorneys' fees

provisions is a matter of first impression not previously considered by the United States Court of Appeals for the Second Circuit and a matter that impinges on the rights of states to regulate and monitor the conduct of persons admitted to practice law in the states.

6. The Court has the authority under Rule 62(d) of the Federal Rules of Civil Procedure to stay is July 22, 2003 Memorandum Opinion and Order pending appeal. Rule 8(a) of the Federal Rules of Appellate Procedure states that a stay of judgment should be sought from the district court under Rule 62(d) before seeking a stay from the appellate court.

7. A stay of the Court's July 22, 2003 Memorandum Opinion and Order would not cause irreparable harm to the parents. Ms. Marilyn Arons certified to the Court on December 20, 2002 that she has provided the parents with services in this matter on a contingency basis. Ms Arons has not articulated any present intent to collect part or all of her claimed fee from the parents.

8. The District currently funds the student's education at Dutchess Community College, as well as provides the student with certain related services keyed to the student's individualized needs and abilities. The parties have amicably developed special education service plans for the student since the 2000/01 school year.

9. The District is prepared to post a supersedeas bond pending any stay granted by the Court if so directed by the Court.

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s/ Barbara J. Donegan
Barbara J. Donegan

Sworn to before me this 21st
day of August, 2003

s/ Jeffrey J. Schiro
Notary Public

APPENDIX K — MEMORANDUM OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED AUGUST 29, 2003

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

99 Civ. 9294 (CSH)

PEARL MURPHY AND THEODORE MURPHY,

Plaintiffs,

-against-

ARLINGTON CENTRAL SCHOOL DISTRICT BOARD OF EDUCATION,

Defendant.

MEMORANDUM

HAIGHT, *Senior United States District Judge*:

In an opinion reported at 2003 WL21694398 (S.D.N.Y. July 22, 2003), the Court adjudicated the plaintiffs' right to recover costs and fees. Plaintiffs sought to recover from defendant $29,350 in respect of services rendered by Marilyn Arons and $7,874.14 in respect of mileage expenses incurred by plaintiff Pearl Murphy, for a total of $37,224.14. The Court disallowed the mileage claim, reduced the Arons claim to $8,650, and directed defendant to pay that amount to plaintiffs.

Defendant filed a timely notice of appeal, and now moves pursuant to Federal Rule of Civil Procedure 62(d) for a stay

of this Court's order pending appeal. In aid of that motion, defendant's assistant superintendent says that "[t]he District is prepared to post a supersedeas bond pending any stay granted by the Court if so directed by the Court." Donegan affidavit at ¶ 9. Defendant misconstrues Rule 62(d), which provides in pertinent part: "When an appeal is taken the appellant by giving a supersedeas bond may obtain a stay . . ." Thus the giving of a supersedeas bond to obtain a stay is mandated by the Rule; a Court direction that the bond be given is neither necessary nor appropriate.

Counsel for the District should consult Local Civil Rule 65.1.1. for the procedures to be followed. Presumably the District will furnish a surety company bond. The Clerk of the Court maintains a list of approved surety companies. A bond issued by an approved surety company is presented to the Judgment and Orders Clerk, who examines it for form and content and, if the Clerk approves the bond, the Clerk endorses the bond and files it without first submitting it to the District Judge. Ordinarily the Clerk requires that security be given for 111% of the amount specified in the judgment or order from which the appeal will be taken. Other forms of security pending appeal are available, and are described in the local rule.

The Court will not consider defendant's motion for a stay until the record demonstrates that proper security has been lodged with the Clerk.

It is SO ORDERED.

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Dated: New York, New York
August 29, 2003

s/ Charles S. Haight, Jr.
CHARLES S. HAIGHT, JR.
U.S.S.D.J.